INCORPORATION BY REFERENCE.

Under the general law of wills, as unaffected by particular statutory provisions of the character mentioned below, extrinsic papers and documents may sometimes, as the saying is, be incorporated into a will by reference.[1] In order to thus incorporate a paper into a will by reference, two things are necessary: (1) It must be clearly designated by the description given of it in the will, as a then existing paper;[2] (2) it must be shown to have been in existence at the time when the will was executed, and must be identified.[3] And there is also a corollary to this rule, to the effect that a legally executed codicil referring to a previous will which was defectively executed or attested, or which has become inoperative, may, by incorporation, render the earlier will a valid testamentary disposition.[4]

In 1881, the Supreme Judicial Court of Massachusetts in the case of Newton *v.* Seaman's Friend Society,[5] already cited, gave the authorities elaborate consideration. In that case, a codicil to the will which the court below had admitted to probate, contained the following provision: "I revoke that part of my will which gives directions for the payment of my legacies, and order and direct my executors * * * to pay the several legacies mentioned in my wills and codicils, as near as possibly convenient, *according to the directions* written in a book by Melvin W. Pierce, signed by me, Alexander De Witt, and witnessed by said Melvin W. Pierce." The book thus referred to was duly identified and was proved to have been in existence when the codicil was made. The "instructions" written therein, directed the payment, in specific property, of legacies given in the will. The court said:

"If a will, executed and witnessed as required by statute, incorporates in itself by reference *any document or paper* not

[1] Newton *v.* Seaman's Friend Soc'y, 130 Mass. 91; 1 Jarman on Wills, 89.

[2] In Goods of Kehoe, 13 L. R. (Ir.) 13; 1 Jarman on Wills, 90.

[3] Singleton *v.* Tomlinson, L. R. 3 App. Cas. 404.

[4] See Matter of Andrews, 43 App. Div. p. 400, citing Croker *v.* Hertford, 4 Moore P. Cas. 339, and Allen *v.* Maddock, 11 *id.* 427.

[5] 130 Mass. 91.

so executed and witnessed, whether the paper referred to be in the form of a *will or codicil*, or of a deed, or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such."[1]

The purpose of the present discussion is to compare these general principles with the New York decisions, in order to ascertain the true scope and bearing of the latter.

If we are to rely upon a dictum found in Booth *v.* The Baptist Church,[2] the law of this State differs radically from that already set forth. In that case, which was an action for judicial construction of the will of John Guy Vassar, one of the questions presented was, whether a certain unattested memorandum mentioned in the will might be incorporated therein by reference. The will itself gave a legacy of ten thousand dollars in capital stock of "some good railroad or coal company," to be selected by the legatee from the testator's securities. The testator then added: "Among my papers will be found a memorandum of the various securities I have selected for the payment of the several legacies." Such a paper was found preserved with the will. This list set apart for the legatee in question $10,000, or 100 shares N. Y., L. & W. R. R. stock. The question presented was "whether this memorandum is to have effect as an integral part of the will, and so convert what by that instrument is either a general or demonstrative legacy into a specific one; and that involves the further inquiry whether the memorandum is a *mere identification* of the thing given, or is *testamentary* in its character." It was held that the memorandum was testamentary, and so not capable of incorporation. It will thus be seen that the decision turned on a distinction unknown to the general law of the subject in other jurisdictions. On this point the court says:

"It is unquestionably the law of this State that an unattested paper which is of a testamentary nature cannot be

[1] Citing Jackson *v.* Babcock, 12 Johns. (N. Y.) 389; Tonnele *v.* Hall, 4 N. Y. 140; Chambers *v.* McDaniel, 6 Ired. 226; Beall *v.* Cunningham, 3 B. Mon. 390; Harvy *v.* Chouteau, 14 Missouri, 587; Goods of Durham, 3 Curt. Eccl. 60. [2] 126 N. Y. 215.

taken as a part of the will even though referred to by that instrument."

In estimating the value of these remarks, attention should be particularly called to the fact that in the case under consideration, the attempt to incorporate the extrinsic memorandum by reference, did not comply with the rules already stated which require that to accomplish that result the extrinsic paper must in the will be clearly designated as a then existing paper, and must, in subsequent proceedings, be shown to have been in existence when the will was executed. For the will refers to it in these terms: "Among my papers will be found a memorandum," &c. This obviously is open to two objections: First, that it does not identify the particular paper referred to; its date, if it had one, is not given; it is not referred to as being in existence when the will was executed. Secondly, the memorandum in question appears in fact to have been made out after the will was executed, for it was entitled "List of securities which I wish transferred to different institutions under my will of Feb'y, 1885." Obviously, this memorandum could not, on any theory, have been admitted as part of the will. The question, therefore, of what might have been done if the memorandum had been duly referred to, and had been shown to have been in existence when the will was executed, was not before the court, and its general remarks on this subject must be read in the light of this fact.

It will be of interest, however, now to examine the three cases of Langdon *v.* Astor's Exrs.,[1] Williams *v.* Freeman, [2] and Matter of O'Neil,[3] cited by the Court of Appeals as supporting the principle laid down by it, in order to see whether they justify its dictum.

In Langdon *v.* Astor's Exrs.,[1] the testator by will gave certain legacies, providing in effect in the will that if during his life he made advances to the legatees and also charged such advances against them on his books, such advances should count as satisfaction of the legacies *pro tanto*. Here no real case of incorporation was presented at all, and the entries he did make in his books were in fact admitted in evidence for the purpose proposed.[4]

[1] 16 N. Y. 26. [2] 83 N. Y. 561. [3] 91 N. Y. 516.

[4] Compare Matter of Burdsall, 64 App. Div. 346.

In Williams *v.* Freeman,[1] the question was whether a certain memorandum written by the testator might be offered in evidence to aid in the interpretation of his will. There is nothing whatever to show that it was even mentioned in the will itself.

In Matter of O'Neil,[2] the will was written on a blank form, and having been carried down to the final printed clause, it stops in the middle of a sentence. Then follow the signature of the testator, the attestation clause, and the signatures of the witnesses. After these, the interrupted sentence proceeds to its conclusion. The question was whether the will was "subscribed" by the testator "at its end," and the court held that it was not. The will itself contained no provision incorporating into itself the clause outside, and there was nothing to show whether it was in existence when the testator signed, nor was it, probably, a separate paper within the sense of the rule relating to incorporation by reference. It is true that in the opinion in this latter case, the court says: "It is not believed that any paper or document containing testamentary provisions not authenticated according to the provisions of our statute of wills has yet been held to be a part of a valid testamentary disposition of property simply because it was referred to in the body of the will." This remark, if taken literally, appears to be quite correct, for the "mere reference," in a will, to an outside paper, whether testamentary or not, has never been supposed to incorporate it into the will, in the absence of an indication, in the will, that such an incorporation was intended by the testator. But if the remark quoted meant more than this, it should be noticed that it is a pure dictum, and that no authorities are cited to support it.

Such are the authorities cited by the court in Booth *v.* The Baptist Church,[3] against the incorporation, by reference in a will, of an earlier instrument of a testamentary character. Attention must now be called to the case of Brown *v.* Clark.[4] There the testatrix, while unmarried, executed a will which was, as the court decides, wholly revoked by her subsequent marriage. After marriage she duly executed a "codicil," which referred to the revoked

[1] 83 N. Y. 561. [2] 91 N. Y. 516. [3] 126 N. Y. 215. [4] 77 N. Y. 369.

will by date and the names of the attesting witnesses, and declared the intention of the testatrix thereby to republish, reaffirm and adopt the will, as modified by the codicil, as her present will, and added "which [codicil] in connection with and amendment of my will I now publish and declare together as constituting my last will and testament." And the court says: "The general doctrine is well settled that a codicil executed with the formalities required by statute for the execution of wills, operates as a republication of a will so far as not changed by the codicil. * * * It is established by a long line of authorities that *any written testamentary document* in existence at the execution of a will may by reference be incorporated into and become part of the will, provided the reference in the will is distinct and clearly identifies, or renders capable of identification, by the aid of extrinsic proof, the document to which reference is made.[1] * * * I am of the opinion that the publication of the codicil was a publication of the will, and that both papers together are to be considered as the will of the testatrix."

The inconsistency between the rules laid down by the Court of Appeals may be seen even more clearly if they are placed side by side.

"Any written testamentary document in existence at the execution of a will may by reference be incorporated into and become part of the will."[2]	"An unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument."[3]

To the same effect as Brown *v.* Clark, *supra*, are Matter of Knapp[4]; Storm's Will[5]; Caulfield *v.* Sullivan[6]; Mooers *v.* White[7]; Van Cortlandt *v.* Kip[8]; Tonnele *v.* Hall[9]; Jackson *v.* Babcock.[10]

In Matter of Knapp, *supra*, the testator executed three instruments, as follows: (*a*) a will, in 1885; (*b*) another will, in 1889, which revoked the earlier will; (*c*) a codicil, in 1890, to the will of 1885, which last named will was, in

[1] Citing numerous cases. [2] Brown *v.* Clark, 77 N. Y. 369.
[3] Booth *v.* The Baptist Church, 126 N. Y. 215.
[4] 51 State Reporter, 517; 23 N. Y. Supp. 282. [5] 3 Redf. 327.
[6] 85 N. Y. 153, 160. [7] 6 Johns. Ch. 360, 375. [8] 1 Hill, 590; 7 Hill, 346.
[9] 4 N. Y. 140. [10] 12 Johns. (N. Y.) 389.

said codicil, ratified and confirmed. The codicil made no mention of the intermediate will. It was held that the codicil operated to revive the will of 1885[1]. In Storm's will, *supra*, the testator had executed a will in 1871, and a codicil in 1873, which latter expressly referred to the will and declared that it and the codicil were to be taken together. One of the two witnesses to the original will could not be found, although it could not be shown that he was absent from the State, or dead or insane. But it was held that this was immaterial, as, even if the will were defectively executed the defect would be cured by the due execution of the codicil, which was proved. In Mooers *v.* White, *supra*, the testator had executed a will containing a devise to two persons, but as to them the will was void because they were witnesses; but the court held that this devise was validated by a codicil which incorporated the will by reference. In Caulfield *v.* Sullivan, *supra*, the will and codicil were executed in France by a resident of New York. It was claimed that the execution of the will had not been duly proved. In reply to this the court says that to this claim there are two answers: first, that the Surrogate had jurisdiction to admit it to probate, and that if he did do so without sufficient proof, this was a mere error in the exercise of his jurisdiction, which could be corrected only by application to the Surrogate's Court or by appeal from its decree; and second, that the codicil, which had been duly proved, distinctly referred to and identified the will, and hence the will and codicil together constituted the will of the testator.

An attempt to explain the dictum in Booth *v.* The Baptist Church, *supra*, might—though apparently without much plausibility—be based on the fact that our statute requires a will to be subscribed at the end thereof, and that in this respect it would belong to or resemble the class of cases illustrated by Matter of O'Neil, *supra*, cited in the opinion in the Booth case. Although this view might receive a certain support from the opinion of the Surrogate in Thompson *v.* Quimby[2] (where, however, it did not appear that the extrinsic paper referred to in the will had ever in fact

[1]To the same effect is Matter of Campbell, 35 Misc. 572. [2]2 Bradf. 449.

existed[1]), yet any force it might otherwise possess is negatived by the decision in Brown *v.* Clark, *supra*, where a former will, which had been revoked, was revived, that is, incorporated, though not forming a physical part of the continuous document which was subscribed at its end.

It is upon the point last discussed, however, relating to the statutory requirement of subscription " at the end " of a will, that some later cases base the conclusion that extrinsic instruments cannot now be incorporated into a will by reference.[2] But that such reasoning is fallacious and erroneous, is made clearly apparent in the unanimous and exhaustive opinion of the Court of Appeals in the Matter of Andrews.[3] There the will was drawn on a printed blank, being one piece of paper, consisting of a sheet of four pages, the two leaves of which were joined from top to bottom on the left side. The formal opening part of the will was printed on the top of the first page, leaving the rest of that page blank; the closing part, containing the clause for the appointment of the executor, and that which followed, including the attestation clause, was printed on the top of the second page of the first leaf, leaving the rest of that page, and both pages of the second leaf, blank. The draftsman filled the blank on the first page, and then turned to the first page of the second leaf, being the third page of the blank, and filled that, marking it at the top "2nd page." He then turned to the second page of the first leaf, containing the closing part of the will in print, marked it at the top " 3rd page," and filled in the blanks in the printed matter; and below this appeared the signatures of the testatrix and the witnesses. The first and second pages of the first leaf constituted a complete instrument, as no sentence was continued from the first page to the third, or from the third to the second. Among other things, the court says: " It is urged with much ability * * * that the alleged second page of this will can be read into it by invoking the doctrine of incorporation as established in England, and, to some extent, in this State. We are of opinion that, under the facts here disclosed, that

[1]Thompson *v.* Thompson, 21 Barb. 107; see brief of counsel for appellants, *id.* pp. 107–108.

[2]Matter of Andrews, 43 App. Div. 394; Cook *v.* White, 43 App. Div. 388; both of which have since been passed on in the Court of Appeals.

[3]162 N. Y. 1.

doctrine has no application." Compare Matter of Conway[1]; Matter of Hewitt[2]; Matter of O'Neil[3]; and Matter of Blair.[4]

The same court which had decided the Andrews case below, also had before it at the same term a case involving the doctrine of incorporating or reviving, by reference in a codicil, a former but not validly executed will.[5]

In that case, it was assumed that the testator, at the time of executing the original will, was incompetent, on account of drunkenness, but the will was sustained by virtue of the reference to it in a later codicil, the due execution of which was proved. And the court says: "We think that the rule of this State, while it excludes unattested or insufficiently attested or published testamentary documents from probate, though referred to in a subsequent properly executed will or codicil, does not prevent such a will or codicil from ratifying or reviving a properly attested instrument which, for any reason, might be inoperative." The judgment in this case was unanimously affirmed in 167 N. Y. 588, without opinion.

The authorities in New York, therefore, appear to fall into four groups: (1) the earlier cases, down to and including Brown *v.* Clark[6] and Caulfield *v.* Sullivan,[7] holding that the general rule of incorporation by reference exists in full force in this State; (2) cases, illustrated by Booth *v.* The Baptist Church,[8] holding or stating, that an "unattested" paper of a testamentary character cannot be incorporated by reference; (3) cases like Matter of O'Neil[9] and Cook *v.* White[10] suggesting that this exclusion of earlier unattested testamentary instruments has some relation to the statutory requirement that a will must be subscribed at its end; and (4) cases like Matter of Andrews,[11] which appear to disclaim the validity of any such reasoning, thus leaving as the test of the right to incorporate by reference, the fact that the earlier testamentary instrument was or was not originally "attested" or executed as required by the statute of wills.

---

[1] 124 N. Y. 458. [2] 91 N. Y. 261. [3] 91 N. Y. 516.
[4] 84 Hun, 581, 152 N. Y. 645. [5] Cook *v.* White, 43 App. Div. 388.
[6] 77 N. Y. 369. [7] 85 N. Y. 153. [8] 126 N. Y. 215. [9] 91 N. Y. 516.
[10] 43 App. Div. 388; 167 N. Y. 588. [11] 43 App. Div. 394; 162 N. Y. 1.

It is quite clear that the suggestion that "unattested" instruments are to be excluded from incorporation by reference, by reason of the requirement of the statute of wills, is valueless; for if that statute excluded unattested extrinsic instruments, it would exclude all extrinsic instruments; and this it certainly does not do.[1] On the other hand, the principle that, apart from this statute, unattested instruments are excluded while attested ones, though inoperative, may be revived by incorporation, presents many peculiarities. On its face, and at first glance, it might seem that the meaning of the courts was merely this: that for some unknown reason the former well-established principle of incorporation by reference had been wholly discarded in New York, except in one respect, namely, that if a will had once been in all respects validly executed and in force, and then, by revocation, or by the marriage of the testatrix, or otherwise, had lost its validity, it might be revived or incorporated and given effect, by the terms of a later will or codicil. But further examination seems to show that this would not be a correct statement of the doctrine. For in Caulfield *v.* Sullivan,[2] it is held that the will would be revived by the duly executed codicil, even though it should appear that the execution of the will itself had not been proved. And in Cook *v.* White,[3] it was held that a will could be revived by proper reference in a duly executed codicil, even though the testator was temporarily incompetent, at the time when he went through the form of executing the will. Thus it appears that an earlier testamentary instrument may be revived or incorporated by reference in a duly executed codicil, in the absence of any proof whatever that the will was *duly* executed, or even where it is assumed as proved that it was not duly executed.

In fact the only distinction that can be drawn between wills which have been admitted to incorporation by reference and those which have been excluded, lies in this: that the former *looked as if* they had been duly executed, while the latter did not even purport to have been executed at all. This distinction would, in a way, harmonize the decisions, but it relates to mere outward form. For of what im-

[1] Brown *v.* Clark, 77 N. Y. 369; Cook *v.* White, *infra; In re* Brand, 73 N. Y. Supp. 1073. [2] 85 N. Y. 153, 160. [3] 43 App. Div. 388; 167 N. Y. 588.

portance is it that the names of the testator and witnesses are on a paper, in the absence of proof that they are genuine signatures, and that the testator declared the instrument to be his will, and requested the witnesses to sign? And of what importance that he and the witnesses did go through the prescribed forms, if he had no testamentary capacity? Such a distinction has no basis in reason, and no basis in law except the bare fiat of the courts. And yet on any other theory, the decisions are in hopeless conflict.

STEWART CHAPLIN.